(10)

No. 95-1201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ AND DAVID SERENA,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA, STATE OF CALIFORNIA,
Appellees,

STEPHEN A. SILLMAN,
Intervenor-Appellee.

On Appeal from the United States District Court for the Northern District of California

BRIEF OF THE CALIFORNIA JUDGES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

ELWOOD G. LUI
JONES, DAY, REAVIS & POGUE
555 West Fifth Street, Suite 4600
Los Angeles, California 90013
(213) 489-3939

BARBARA MCDOWELL
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amicus

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INTEREST OF THE AMICUS[1]

The California Judges Association is the professional association of the California state judiciary. Its mission includes maintaining the integrity of the California judiciary as an

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[1] Counsel for appellants, appellees, and intervenor have consented to the filing of this brief *amicus curiae*. Their consents are on file with the Clerk of the Court.

independent branch of the state government and providing leadership and advocacy on matters affecting the courts. The Association takes no position on the underlying merits of this case. The Association's sole concern is that the Voting Rights Act not be applied at all to California's judicial selection system, which does not ordinarily involve either "elections" or the choice of "representatives" in any commonly understood sense of those terms. California has made the considered judgment that the state judiciary, unlike the legislative and executive branches of the state government, is to be shielded from the pressures of elective politics. The Voting Rights Act was not designed to apply to judicial selection in California and other states that have made that judgment.

SUMMARY OF THE ARGUMENT

This Court held in *Chisom v. Roemer*, 501 U.S. 380, 400 (1991), that the Voting Rights Act applies to state judicial elections in which would-be judges "vie for popular support just as other political candidates." The Voting Rights Act cannot properly be applied to California's judicial selection system, however, because California judges do not reach office by election and do not serve as representatives of the popular will.

Virtually all California judges are initially appointed by the Governor, after review of their qualifications by a committee of the State Bar, to seats that are either vacant or soon to become vacant. The judges do come before the voters every six to twelve years. But these elections are essentially confirmatory; they are non-partisan, rarely contested (indeed, appellate judges never face an opponent), and even more rarely result in the defeat of an incumbent judge. It is, therefore, gubernatorial appointment, not popular election, that determines the composition of the California judiciary. Moreover, California has taken care to assure that judges are, as the Court put it in *Chisom*, "indifferent to popular opinion." 501 U.S. at 401. They are bound to act independently of popular sentiment, to forgo partisan political activity, and to refrain from taking public positions on matters that may come

before them. They are not, therefore, "representatives" of their constituencies within the meaning of the Voting Rights Act.[2]

ARGUMENT

THE VOTING RIGHTS ACT APPLIES ONLY TO JUDICIAL SELECTION PROCEDURES UNDER WHICH JUDGES ARE ELECTED REPRESENTATIVES OF THE PEOPLE

The Voting Rights Act applies to judicial selection procedures that result in a denial or an abridgement of "the right . . . to vote" — that is, that deprive citizens of the opportunity "to participate in the political process" and "to elect representatives of their choice." 42 U.S.C. § 1973(a), (b) (1994); *see Chisom*, 501 U.S. at 397-98, 404 (applying Section 2 of Voting Rights Act to judicial elections); *Clark v. Roemer*, 500 U.S. 646 (1991) (applying Section 5 of Voting Rights Act to judicial elections). Section 2 allows citizens to challenge any "standard, practice, or procedure" that may deny or abridge the right to vote. 42 U.S.C. § 1973. Section 5 requires a covered jurisdiction to obtain judicial or administrative pre-clearance before enforcing a new "standard, practice, or procedure" to ensure that the change

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[2] The applicability of the Voting Rights Act to the California judicial selection process has not been raised here by the parties. It is nonetheless permissible, of course, for the Court to address "important questions not raised by the parties," *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971), especially when they are "antecedent to" and "ultimately dispositive of" the questions that the parties have raised. *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). In the event that the Court chooses not to reach this threshold question, however, *amicus* respectfully requests that the Court at least not foreclose litigants, in this case or future cases, from challenging the applicability of the Voting Rights Act to judicial selection systems, like California's, that are characterized by gubernatorial appointment followed by an election that is, by law or by practice, essentially confirmatory.

does not have the purpose or effect of denying or abridging the right to vote. 42 U.S.C. § 1973c (1994).[3]

For two reasons, the California judicial selection system does not implicate "the right to vote": *first*, because judges are not, as a practical matter, chosen by election and, *second*, because judges do not, and cannot under state law, serve as representatives of the popular will.

I. The Voting Rights Act Should Not Apply Where, As In California, Judges Do Not Gain Office By Election

As this Court has recognized, the Voting Rights Act is concerned exclusively with the selection of officials through "representative, popular elections." *Chisom*, 501 U.S. at 399. Accordingly, if a state's judges almost exclusively reach office by means other than "popular election," the Voting Rights Act should not apply.

Indeed, the Court acknowledged in *Chisom* that the Voting Rights Act would not apply to a judicial selection system that, like the federal system, provides for judges to be appointed by the chief executive with confirmation by the legislature. *See* 501 U.S. at 401 (observing that "Louisiana could, of course exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed"). The judicial selection system in California is not appreciably different, as a practical matter, from a purely appointive system.

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[3] The standard for whether the Voting Rights Act applies to a judicial selection system should be the same under both Section 2 and Section 5. It would be "anomalous" for a judicial selection system to be acceptable if preexisting, but unacceptable if proposed for the future, or vice versa. *Chisom*, 501 U.S. at 401-02 (concluding that Congress intended that the two sections have comparable reach); *see also* S. Rep. No. 417, 97th Cong., 2d Sess. 2, 12 n.31 (1982), *reprinted in* 1992 U.S.C.C.A.N. 177, 178, 189 n.31 ("[I]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.").

More than ninety percent of all California judges reach the bench by gubernatorial appointment to fill positions that are vacant or about to become vacant. *See* Dixie K. Knoebel, *The Voting Rights Act: Are Its Provisions Applicable to the Judiciary?*, 13 State Ct. J. 24, 26 (1989). "These vacancies occur all the time as judges retire, die, or leave the bench, or as the Legislature creates new judgeships." *Introduction to the California Merit Plan for Judicial Selection*, 43 State Bar J. 156, 156-57 (1968).

The appointment process is designed to reflect merit rather than partisan political considerations. The Governor is required by law to submit the names of all potential appointees to the Committee on Judicial Nominees Evaluation of the State Bar "for evaluation of their judicial qualifications." Cal. Gov't Code § 12011.5(a) (West 1992). The Committee prepares a confidential report assessing whether the individual is "exceptionally well-qualified, well-qualified, qualified, or not qualified." *Id.* § 12011.5(c). The Committee is to consider such factors as the individual's "legal experience," "judicial temperament," "ability," "industry," "honesty," and "objectivity." *Id.* § 12011.5(d). In addition, the Governor's nominees to the Supreme Court and the courts of appeal must be confirmed by the Commission on Judicial Appointments, which is composed of the Chief Justice, the Attorney General, and a senior presiding justice of the Courts of Appeal. Cal. Const. art. VI, § 7. California's judicial selection system thus constitutes a modified version of the so-called "Missouri Plan," which was proposed by the American Judicature Society in the early part of this century for the merit selection and retention of judges. *See, e.g.*, Glenn R. Winters, *Selection of Judges — An Historical Introduction*, 44 Tex. L. Rev. 1081, 1083-85 (1966).

To be sure, California judges, once appointed, are required to stand for office — every twelve years for appellate judges, and every six years for lower court judges. But these are not "popular elections" in any true sense of the word. Appellate judges are subject only to retention elections, where they "run on their records with no opposition, the ballot merely presenting the

question whether the candidate 'shall be elected.'" 2 B.E. Witkin, *California Procedure (Courts)* § 2 (3d ed. 1985). Superior and municipal court judges may, in theory, face an opposing candidate. But they rarely ever do. According to one observer, "[c]ontested races are so rare that 'it's like being struck by lightning.'" *Winning Judge Wallerstein Demurred in Courting the Electorate*, Los Angeles Times (Valley ed.), June 14, 1994, at B-5 (quoting chairman of Los Angeles County Bar Association's Judicial Evaluation Committee). For example, of the seventy-four judges on the Los Angeles Superior Court whose terms were to expire this year, only four faced any opposition at all. Alan Abrahamson, *Jurist's "Not Qualified" Rating Heats Up Race*, Los Angeles Times (Valley ed.), March 14, 1996, at B-5. The unopposed incumbents did not even appear on the ballot. *Id.*; *see* Cal. Const. art VI § 16(b) (authorizing such procedure). Moreover, even in a contested judicial election, the sitting judge almost always wins. *See, e.g.*, Abrahamson, *supra* ("In the 1990s in Los Angeles County, not one incumbent Superior Court judge has lost an election. In the '80s, two lost — and one of them was literally on his deathbed.").

One commentator has observed that California appellate judges, because they are initially appointed to office and are subject only to occasional retention elections, "in effect are given the opportunity of securing life tenure." 2 B.E. Witkin, *California Procedure (Courts)* § 2. The same may be said of California trial judges, who are likewise appointed, who are rarely subject to any contested election, and who are even more rarely turned out of office. *See Introduction to the California Merit Plan for Judicial Selection*, 43 State Bar J. at 156-57 (because trial judges are initially appointed and subsequently "rarely opposed on the ballot," their "appointment, in effect, is likely to become one for life"). California judges neither gain office, nor remain in office, as a result of a "popular election."

The process by which these judges are selected should not, therefore, be subject to the Voting Rights Act.[4]

II. The Voting Rights Act Should Not Apply Where, As In California, Judges Cannot Act As Representatives

There is an additional reason why California's judicial selection system should not be subject to the Voting Rights Act. California has carefully crafted that system to ensure that judges neither act, nor are perceived to act, in response to the popular will. They are not, therefore, "representatives" within the meaning of the Voting Rights Act.

California judges, unlike the Louisiana judges in *Chisom*, are not "compel[led] to vie for popular support just as other political candidates." 501 U.S. at 400. Quite the contrary. A judicial election — in the unlikely event that one occurs — is strictly non-partisan.[5] A judge cannot commit or appear to commit to positions with respect to cases, controversies, or issues that could come before the courts. Cal. Code of Judicial Ethics Canon 5A (1996). Judges are ineligible for any other public employment or public office, so as to prevent them from being partisan or even appearing so. Canon 4C; 40 Cal. Jur. 3d (Rev) Part 1 *Judges* § 4, at 421 (1995). Nor can judges hold office in any political organization. Canon 5B. A failure to comply with these requirements can lead to the judge's removal from office. Cal.

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[4] It has been suggested in other contexts that judges should not be considered to be "elected" if they were initially appointed to office and then subject only to retention elections. *See Gregory v. Ashcroft*, 501 U.S. 452, 481-82 (1991) (White, J., dissenting) (assuming that judges appointed by Governor and subject to retention elections were appointed rather than elected within the meaning of the Age Discrimination in Employment Act); *see also id.* at 467 (O'Connor, J.) (refraining from addressing this question).

[5] In contrast, while the Louisiana judges in *Chisom* competed in an "open primary," their political party affiliations were listed on the ballot. *See* Brief for Petitioners at 5, *Chisom v. Roemer*, 501 U.S. 380 (1991) (No. 90-757).

Const. art. VI, §§ 8, 18(b)-(m); *Doan v. Commission on Judicial Performance*, 902 P.2d 272, 278-79 (Cal. 1995).

Not only are judges prohibited while seeking office from acting like "other political candidates"; they are also prohibited while in office from acting like other political officials. Judges are obligated to remain scrupulously independent and impartial, dispensing justice "without fear or favor" as to any person. *See* Canon 1 cmt. Judges must be "faithful to the law regardless of partisan interests, public clamor, or fear of criticism," and must not "manifest bias or prejudice," including prejudice based on race or national origin, in performing judicial duties. Canons 3B(2), 3B(5). Judges cannot allow political or other relationships to influence their official conduct or judgment. Canon 2B. Simply put, judges are prohibited from acting as "representatives," in any true sense of the term.

In sum, California's judicial selection system does not implicate "the right to vote" protected by the Voting Rights Act. California judges do not, except in the rarest of circumstances, gain or retain office by contested election. Moreover, when in office, California judges do not serve as representatives of the people, and, in fact, are prohibited by state law from doing so. The Voting Rights Act was never intended to apply to this sort of judicial selection system.[6]

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[6] The Eleventh Circuit recently misconstrued *Chisom* and applied the Voting Rights Act to Florida's appointment-based judicial selection system, without assessing the roles of appointment, uncontested subsequent elections, and other indicia of whether Florida judges are, in fact, selected by election or are representatives of a constituency. *See Nipper v. Smith*, 39 F.3d 1494, 1529-30 (11th Cir. 1994) (recognizing that "it is equally wrong to say that section 2 covers all judicial selections as it is to say it covers none," but failing to assess whether the Act should have applied to Florida's judicial selection system, a modified Missouri Plan), *cert. denied*, 114 S. Ct. 1795 (1995). The court misinterpreted *Chisom* to suggest that coverage by the Act turns solely on whether a judicial selection system contains any election component.

CONCLUSION

The decision below should be vacated and the district court should be directed to dismiss this case on the ground that the Voting Rights Act does not apply to California's judicial selection system.

Respectfully submitted,

ELWOOD G. LUI
JONES, DAY, REAVIS & POGUE
555 West Fifth Street
Suite 4600
Los Angeles, California 90013
(213) 489-3939

BARBARA MCDOWELL
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amicus

July 1, 1996